SUPREME COURT, U. S.

Supreme Court, U. S.
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In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-149

FIRST BANK AND TRUST COMPANY OF BOCA RATON,
As Trustee Under Trust Agreement Dated March 23, 1964,
And Known as Trust No. T509,

Petitioner,

vs.

TOWN OF PALM BEACH,
a Florida Municipal Corporation, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TOWN OF PALM BEACH,
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted in opposition to petitioner's application for a writ of certiorari to the Fourth District Court of Appeal of Florida in which review is sought of the district court's holding that petitioner's challenge to the Town's zoning ordinance, as applied to petitioner's property, must be decided in light of a new comprehensive zoning ordinance enacted by the Town of Palm Beach to replace a prior ordinance held by the Supreme Court of Florida to be void from its inception.

OPINIONS BELOW

The opinion of the Fourth District Court of Appeal of Florida is reported at 298 So.2d 443 and is printed in the Appendix to the Petition for Writ of Certiorari (App. 1a).*

* (App. ____) refers to the Appendix to the Petition for Writ of Certiorari filed herein by petitioner.

That decision incorporates by reference that Court's opinion in *Town of Palm Beach* v. *Royal Palm Beach Hotel, Inc.*, reported at 298 So.2d 439, and printed at (App. 3a). The order of the district court denying petitioner's application for rehearing is not reported and is printed at (App. 10a). The order of the Florida Supreme Court declining to review the decision of the Fourth District Court of Appeal is reported at 311 So.2d 113 and is printed at (App. 11a). The order of the Florida Supreme Court denying petitioner's application for rehearing is not reported and is printed at (App. 12a).

JURISDICTION

Petitioner asks this Court to assert its jurisdiction pursuant to 28 U.S.C. § 1257(3). That provision confers discretionary jurisdiction upon this Court to review state court decisions

> ". . . where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Petitioner's jurisdictional claims are defective because petitioner failed to properly and timely raise the federal question in the state proceedings below (see Point I, *infra*), and because no decision was rendered by the highest state court (see Point II, *infra*).

QUESTIONS PRESENTED

I. Whether the petition for certiorari must be denied because of petitioner's failure to properly and timely raise the federal question in the state court proceedings.

II. Whether the petition for certiorari must be denied because no decision was rendered by the highest state court as a result of petitioner's failure to follow Florida procedure.

STATEMENT OF THE CASE

Petitioner seeks review of the decision of the District Court of Appeal, Fourth District, State of Florida, reversing and remanding this zoning case, and companion cases, for further proceedings in light of a new comprehensive zoning ordinance enacted by the Town of Palm Beach to replace a prior ordinance held by the Supreme Court of Florida to be void from its inception.

Proceedings in the Trial Court

Petitioner and various other property owners in the Town of Palm Beach filed suits in the Circuit Court of Palm Beach County challenging the constitutional validity of the Town's zoning Ordinance 3-70 as applied to their properties, and contending that the ordinance was void because it was enacted in violation of the Florida Government in the Sunshine Law (Fla. Stat. §286.011). The trial judge severed the sunshine issue from other issues in these cases and consolidated the case for trial of that single issue. Following trial, he upheld the Town's position that the ordinance was not enacted in violation of the Sunshine Law. An interlocutory appeal of that decision was taken by one property owner, IDS Properties, Inc. Petitioner and the remaining property owners pro-

ceeded to trial on the constitutionality of Ordinance 3-70 as applied to their particular parcels and the trial judge held the ordinance to be arbitrary and unreasonable as applied to petitioner's property.

Proceedings in the Florida District Court and Florida Supreme Court

The Town appealed from that decision and petitioner cross-appealed on the sunshine issue. The Town's appeal automatically stayed execution of the judgment below in accordance with the provisions of Florida Appellate Rule 5.12, which provides for stay during review of an appeal by the state or any of its political subdivisions, unless the court "on motion for good cause shown" requires a supersedeas bond or other security or condition. Petitioner made no motion for a bond or other security nor did petitioner challenge the Rule by cross-appeal.

Petitioner's cross-appeal on the sunshine issue was consolidated with the previously filed interlocutory appeal on the sunshine issue, and on May 30, 1973, while the appeal from the decision on the merits was still pending in the district court, the district court entered its opinion holding Ordinance 3-70 to be "void in toto" for violation of the Sunshine Law. *IDS Properties, Inc.* v. *Town of Palm Beach* (Fla. App. 4th Dist. 1973), 279 So.2d 353. The district court's decision was certified to the Florida Supreme Court as passing upon a question of great public interest. While the petition on the sunshine question was pending before the Florida Supreme Court, the Town proceeded with new zoning hearings and the enactment of a new comprehensive zoning ordinance to fill the void that would be left should the district court's ruling as to the invalidity of Ordinance 3-70 be ultimately

sustained. On March 26, 1974 Zoning Ordinance 2-74 was enacted, substantially altering the zoning classifications set forth in Ordinance 3-70. On May 1, 1974 the Supreme Court of Florida handed down its opinion affirming the decision of the district court on the sunshine issue and finding Ordinance 3-70 to be "void *ab initio.*" *Town of Palm Beach* v. *Gradison* (Fla. 1974), 296 So.2d 473, 477.

The district court promptly invited counsel to submit briefs discussing the impact of the Florida Supreme Court's decision on the sunshine issue, and after consideration of those briefs, the district court on July 19, 1974 entered its opinion in the instant and companion cases. *Town of Palm Beach* v. *First Bank and Trust Co. of Boca Raton* (Fla. App. 4th Dist. 1974), 298 So.2d 443, *cert. denied* (Fla. 1975), 311 So.2d 113; *Town of Palm Beach* v. *Royal Palm Beach Hotel, Inc.* (Fla. App. 4th Dist. 1974), 298 So.2d 439; and *Town of Palm Beach* v. *Gradison* (Fla. App. 4th Dist. 1974), 298 So.2d 443, *cert. denied* (Fla. 1974), 307 So.2d 448.

The district court found that it was required to decide the case according to the law in effect at the time of the appellate disposition:

> "We are obliged to determine the current appeal in the light of current law. Goodfriend v. Druck, 289 So.2d 710 (Fla. 1974); Ingerson v. State Farm Mutual Automobile Ins. Co., 272 So.2d 862 (3d D.C.A. Fla. 1973); Van Meter v. Murphy, 287 So.2d 740 (1st D.C.A. Fla. 1973); Northeast Polk County Hosp. District v. Snively, 162 So.2d 657 (Fla. 1964); *See* Diffenderfer v. Central Baptist Church of Miami, Fla., Inc., 404 U.S. 212, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972); Fla. East Coast Ry. Co. v. Rouse, 194 So.2d 260 (Fla. 1967)." (298 So.2d 441)

The court further found that Ordinance 3-70 had been held void as a result of petitioner's efforts and that the enactment of the new ordinance was not occasioned by any wrongful design by the Town to circumvent the judicial process or take undue advantage of petitioner:

> "Next, we observe that the action of the courts in erasing Ordinance No. 3-70 from the records was consistent with the efforts of the Plaintiff and contra to the wishes of the Town. The Town defended and sought to uphold its ordinance throughout. Thus, the action of the Town in enacting its current ordinance, No. 2-74, to fill the void was the consequence, at least as to the Town, of unforeseen and unwanted judicial action. It was in nowise occasioned by any wrongful design or effort on the part of the Town to leapfrog or circumvent the judicial process and take advantage of the Plaintiff." (398 So.2d at 441)

Finally, the district court found that to attempt to apply the circuit court's finding to a new ordinance with new and different classifications not previously considered by the trial judge would be impossible:

> "Finally, we have re-examined and re-studied the appealed judgment in view of what we have said. Plainly, if we scissor out all reference to the void ordinance and its classifications, the findings and decision under review are meaningless. Further, neither the Town, nor we, could appropriately administer that judgment in the future except by ignoring the fact that Ordinance No. 3-70 has been declared illegal and void ab initio, and by ignoring the fact that at a later point in time the Plaintiff's lots and all other neighboring lands have been re-zoned, using new and different

classifications and considering changed conditions. And so, even if we were to adopt the Plaintiff's suggestion earlier mentioned, it would create an awkward and unfair situation. It likely would not be harmonious with the plan of the new ordinance and the new zoning assigned to neighboring lands. Zoning cannot be accomplished in a vacuum on a spot or lot by lot basis without regard to neighboring properties and a proper over-all plan and basic program. There must be correlation and harmony according to basic planning and zoning principles. F.S. 163.190 (1973).

"It may be repetitious to remark, but it bears repeating, that we cannot take an old adjudication; using void, old and different criteria, and necessarily fit it into a viable, new and different zoning scheme. --It might fit, but it might not, and surely the trial court should have an opportunity to measure in the interest of those affected." (298 So.2d at 441-42)

The district court thus reversed and remanded the cause for reconsideration by the trial judge in light of current Zoning Ordinance 2-74:

"We hold that the adjudication and appealed judgment are moot. Therefore, we rest our holding and appellate decision upon the authority of Lelekis v. Liles, 240 So.2d 478 (Fla. 1970). . . .

"We reverse and remand with respectful instructions that the parties be allowed to amend their pleadings as they are advised within a reasonable length of time to be set by the trial court in its discretion. Such amendment shall be in the interest of making issues as to zoning of Plaintiff's lots under the current zoning ordinance, No. 2-74." (298 So.2d at 442)

Petitioner's Belated and Ineffectual Attempt to Raise the Federal Question

Petitioner filed, within the time provided by the Florida Appellate Rules, a petition for rehearing requesting the district court to reconsider its holding. That petition for rehearing did *not* seek to raise the federal questions sought to be reviewed by the petition for certiorari herein. While the petition was pending, petitioner filed a motion for leave to supplement the petition for rehearing by suggesting, for the first time, that the district court's opinion "raises grave issues concerning the constitutional rights of litigants subject to the automatic supersedeas applicable in cases where the appellant is a municipality, Rule 5.12, F.A.R., 32 F.S.A." (App. 43a) Respondent opposed the motion upon the grounds that it was not timely and that it sought to raise new grounds not previously presented. The District Court of Appeal denied the original petition for rehearing without permitting filing of petitioner's supplement.

Petitioner then filed a petition for writ of certiorari in the Supreme Court of Florida asserting jurisdiction based on an alleged conflict between the decision of the district court and prior Florida decisions. In that petition petitioner again failed to challenge the constitutional validity of Rule 5.12, Florida Appellate Rules, but rather contended merely that the decision of the district court was "in direct conflict with [the Florida Supreme] Court's order promulgating Rule 5.12, Florida Appellate Rules. *In re Florida Appellate Rules*, 139 So.2d 139 (Fla. 1962)." (App. 49a) The Supreme Court of Florida unanimously denied petitioner's petition for writ of certiorari without opinion (App. 11a), and likewise denied the petition for rehearing (App. 12a).

ARGUMENT

The judgment which petitioner seeks to have this Court reinstate was set aside as the result of petitioner's successful effort to have the ordinance under which the trial court's decision was rendered declared void because of violations of the Florida's Government in the Sunshine Law. As a result, the state appellate court has ruled petitioner's property must be reexamined in light of the newly enacted zoning ordinance inasmuch as that court, like this one *[See Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.* (1972), 404 U.S. 212], recognized that it must apply the law in effect at the time of the appellate disposition of the case, not the law in effect at the time of the trial court's decision. Petitioner, belatedly seeks to challenge Florida Appellate Rule 5.12 which had no effect on the outcome below, in an attempt to secure in this forum a result it was unable to obtain in the proper state forum. That Rules provides:

> "(1) When Security Not Required.—When the state or any of its political subdivisions, or any officer, board, commission or other public body of the state or any of its political subdivisions, in a purely official capacity, takes an appeal or petitions for certiorari, the filing of the notice of appeal or the petition for certiorari as the case may be shall perfect the same and stay the execution or performance of the judgment, decree or order being reviewed and no supersedeas bond need be given unless expressly required by the court.
>
> "(2) Court May Require Bond.—The court may, on motion for good cause shown, require a supersedeas bond or other security, in such amount, form and manner as it may prescribe as a condition for the further prosecution of the appeal or certiorari." (Fla. App. R. 5.12)

I.

Petitioner Failed to Properly and Timely Raise the Federal Question in the State Court Proceedings.

An essential requirement of 28 U.S.C. §1257(3) under which petitioner seeks to have this Court invoke its jurisdiction, is that a substantial federal question has been properly raised in the state court proceedings. Stern and Gressman, *Supreme Court Practice* §3.25 (4th ed. 1969); Rule 23, Supreme Court Rules.

Failure to "Draw in Question" the State Statute

At no stage in the state proceedings did petitioner directly and clearly challenge Florida Appellate Rule 5.12 as violative of any federal constitutional provision. In its "Supplement to Appellee's Petition for Rehearing" (which was never permitted by the court to be filed), petitioner simply suggested that the court's opinion "raises grave issues concerning the constitutional rights of litigants" (App. 43a); and in its petition for certiorari to the Florida Supreme Court (which was denied without hearing on the basis of lack of conflict jurisdiction, App. 11a), petitioner merely contended that

> "the decision of the District Court, by construing Rule 5.12 to permit petitioner's rights to be defeated without benefit of a hearing or a final judicial determination, places an unconstitutional interpretation on that Rule." (App. 49a)

Section 1257(3), upon which petitioner relies, explicitly requires that the validity of a state statute must have been "drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . . ." (28 U.S.C. §1257) in order for this Court to have jurisdiction.

As stated in *Oxley Stave Co.* v. *Butler County* (1897), 166 U.S. 648, 655:

> "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

Here there was no distinct or clear averment sufficient to "draw in question" the validity of Rule 5.12 based on the federal constitution. Indeed it is not clear from the pleadings below whether petitioner was asserting violation of its due process and equal protection rights under the federal *or the state* constitution.

As this Court stated in *New York Central & H. R. Co.* v. *New York* (1902), 186 U.S. 269, 273:

> "it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth."

Absent a clear reference, it will be assumed that a state statute is being challenged on state constitutional rather than federal constitutional grounds. *New York ex rel. Bryant* v. *Zimmerman* (1928), 278 U.S. 63, 67-8.

Petitioner contends that Rule 5.12 "accords special rights to municipalities . . . not accorded to other parties" inasmuch as "[n]o supersedeas bond need be given by the municipalities unless it is expressly required by the court on *motion of the appellee* for good cause shown." (Petition for Certiorari at 19-20, emphasis added.) We submit that the classification established by this Rule, which is based on the presumption

that the state and its political subdivisions are financially responsible, is a constitutionally valid classification. In any event, petitioner, by failing to either move the court to require a supersedeas or other condition of the appeal, or to directly challenge the Rule in the Florida courts, has waived its right to raise the question in this Court.

Failure to Timely Raise the Federal Question

Petitioner failed to present *any* challenge to Rule 5.12 until after the time for filing a petition for rehearing in the district court had expired. The Florida Appellate Rules permit the filing of only one petition and such petition must be filed within fifteen days after the filing of the decision or order of the court. (Fla. App. R. 3.14) An additional petition not filed within that period will not be considered by the court. *Cali* v. *State* (Fla. App. 2d Dist. 1959), 111 So.2d 703, 707.

Here petitioner first made mention of Rule 5.12 in a "Supplement to Appellee's Petition for Rehearing" attached to a motion for leave to file such paper, filed after the time provided by the Rule for filing a petition for rehearing. Respondent objected and the district court denied "appellee's August 2, 1974 Petition for Rehearing" (App. 10a) without opinion and without permitting the filing of the paper upon which petitioner now bases its claim that a proper federal challenge was presented. Raising a federal question for the first time even in a *timely* petition for rehearing is generally deemed too late unless the state court expressly decides the question. *Radio Station WOW* v. *Johnson* (1945), 326 U.S. 120, 128; *Hanson* v. *Denckla* (1958), 357 U.S. 235, 243-44. Here the question was neither timely presented nor expressly decided by the state court.

The principal authority relied upon by petitioner is this Court's decision in *Brinkerhoff-Faris Co.* v. *Hill* (1930), 281

U.S. 673. In that case the Missouri Supreme Court, overruling earlier decisions which had established procedures for challenging a tax law, established new procedures and held that the plaintiff was bound by the new procedures. Petitioner filed a timely petition for rehearing challenging the action, and upon the refusal of the state court to consider his argument, this Court granted certiorari, stating that "the additional federal claim thus made was timely, since it was raised at the first opportunity." (281 U.S. at 678) Here, unlike the petitioner in that case, petitioner did not raise the constitutional challenge at the "first opportunity," but so delayed making the challenge as to preclude review by the Florida courts. Petitioner made no application for a supersedeas or other condition in accordance with the provision of Rule 5.12; made no cross-assignment of error as to this issue on appeal; and finally, raised the issue only obliquely after the time for filing a petition for rehearing to the district court had expired. There was no change in procedure or rule of law. The automatic stay provision of Rule 5.12 has been in effect more than thirty years (see Chapter 19172, Laws of Florida 1939); and the rule of law upon which the district court based its decision is well recognized and followed in the Florida courts. [*E.g.*, *Goodfriend* v. *Druck* (Fla. 1974), 289 So.2d 710; *Ingerson* v. *State Farm Mutual Automobile Ins. Co.* (Fla. App. 3d Dist. 1973), 272 So.2d 862; *Van Meter* v. *Murphy* (Fla. App. 1st Dist. 1973), 287 So.2d 740; *Northeast Polk County Hosp. Dist.* v. *Snively* (Fla. 1964), 162 So.2d 657; and *Florida East Coast Ry.* v. *Rouse* (Fla. 1967), 194 So.2d 260.]

The district court denied the petition for rehearing without reaching, or even considering, petitioner's suggestion that its opinion, remanding the case for reconsideration in light of existing law, raised "grave issues concerning the constitutional

rights of litigants" (App. 43a). Then having no decision "initially and directly passing on the validity of a state statute" so as to permit an appeal to the Florida Supreme Court [Fla. Const. art. V, §3(b)(1)], petitioner sought review by conflict certiorari asserting that the district court's construction "places an unconstitutional interpretation on that Rule" (App. 49a). The Florida Supreme Court denied certiorari without reaching petitioner's belated challenge to Florida Appellate Rule 5.12.

II.

No Decision Was Rendered by the Highest State Court Because of Petitioner's Failure to Follow Florida Procedure.

Essential to the exercise of this Court's jurisdiction under §1257(3) is that a substantial federal question was raised and decided by the highest state court. As Mr. Justice Frankfurter noted:

> "ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' [Citation omitted.] This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW* v. *Johnson* (1945), 326 U.S. 120, 124.

Where it is not clear from the record that the federal question was necessarily decided by the highest state court, petitioner is called upon to demonstrate that a federal question was properly and timely raised and "was decided as a

necessary ground for reaching the judgment under review." *Herb* v. *Pitcairn* (1945), 324 U.S. 117, 128.

Under the Florida Constitution, the Supreme Court of Florida is empowered to hear, by appeal, decisions passing "on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution." Fla. Const. art V, §3(b)(1). Here petitioner failed to timely raise the constitutional challenge according to rules of Florida procedure and, as a result, neither the state's highest court, nor any other court, decided the question sought to be presented here. And petitioner has made no attempt by certificate [*See* Stern and Gressman, *Supreme Court Practice* §3.29 (4th ed. 1969)] or otherwise, to demonstrate that the federal issue was ever decided.

> "Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." *Street* v. *New York* (1959), 394 U.S. 576, 582.

Analagous is *Stembridge v. Georgia* (1952), 343 U.S. 541. There petitioner sought to raise the question of his federal constitutional rights for the first time in a *timely* motion for rehearing in the state court of appeals. This Court, recognizing that the Supreme Court of Georgia was the "highest court of the state in which a decision could be had in this case," and that the Georgia court could have "denied certiorari on adequate state grounds' (343 U.S. at 546-47), held that the action of the highest state court in refusing, without opinion, to hear the case precluded review by certiorari.

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." (343 U.S. at 547)

Likewise here, petitioner's failure to follow proper state procedure precluded an appeal to Florida's highest court. Petitioner therefore sought review by certiorari based upon an alleged conflict between the decision of the district court and "a decision of another district court of appeal or of the Supreme Court on the same point of law" Fla. App. R. 4.5c (6). The Florida Supreme Court found no conflict and denied the petition on that ground (App. 11a). It is well established that in making its decision as to whether it has conflict jurisdiction, the Florida Supreme Court does not even consider the merits of the controversy, and its decision denying certiorari can be taken to mean no more than that the case is distinguishable in controlling factual elements or in points of law from the case or cases upon which conflict is asserted. *Kyle* v. *Kyle* (Fla. 1962), 139 So.2d 885, 887.

Providing the highest court of the state does not close its door to any consideration of a claim alleging denial of a federal right, this Court will respect the state's procedure, and where the petitioner fails to follow that procedure he will be deemed to have waived the federal issue. *Young v. Ragan* (1949), 337 U.S. 235, 238; *Herndon v. State of Georgia* (1935), 295 U.S. 441, 443. As stated by Mr. Justice Holmes:

> "when as here there can be no pretense that the [state court] adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong." *Nickel v. Cole* (1921), 256 U.S. 222, 225.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 1975, three copies of the Brief in Opposition to Petition for a Writ of Certiorari were mailed, air mail postage prepaid, to Richard F. Babcock, Esquire, Suite 3100, One IBM Plaza, Chicago, Illinois 60611, Counsel for Petitioner. I further certify that all parties required to be served have been served.

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